SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1974

No. 74-668

SHELDON SELIKOFF,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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THE PEOPLE OF THE STATE OF NEW YORK,

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Pursuant to the Revised Rules of this Court, Rule 24, the respondent submits this brief in opposition to the captioned petition for a writ of certiorari.

Question Presented

When a defendant enters a negotiated plea of guilty, and the judge cannot fulfill his sentence promise, is the defendant entitled to more than an opportunity to withdraw his plea of guilty?

Facts

On May 8, 1972 trial commenced on Indictment No. 997/70 which charged the defendant and several co-defendants with various crimes arising out of a complicated real estate swindle.[1]

On May 12, 1972, the defendant appeared before Honorable George D. Burchell and entered a plea of guilty to one count of Grand Larceny in the Second Degree in full satisfaction of three indictments charging seventeen counts of Grand Larceny in the First Degree, sixteen counts of Grand Larceny in the Second Degree, three counts of Conspiracy in the Third Degree and two counts of Criminal Facilitation in the Second Degree.[2] At that time the judge

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[1] By a separate indictment (606-70), the defendant was charged with obscenity and related offenses. As he entered a separate plea to that indictment and was fined $1,000 even though he was offered an opportunity to withdraw his plea and filed a notice of appeal, that judgment is not germane to the issues raised.

[2] The disposition of the co-defendants, who were charged in Indictments 997 and 998 is as follows:

Ruben Posner: May 12, 1972 plead guilty during trial to Offering a False Instrument for Filing in the Second Degree (he had been charged with Grand Larceny in the Second Degree [six counts], Forgery in the Second Degree and Perjury in the Second Degree in addition to the crime to which he plead guilty).

Herbert Posner: June 10, 1972 jury verdict not guilty (he had been charged with Commercial Bribe Receiving and Perjury in the First Degree).

Guy Cocozza: February 27, 1973 plead guilty to Criminal Facilitation in the Second Degree (By Indictment No. 997/70 he was charged with Grand Larceny in the Second Degree [three counts], conspiracy in the Third Degree and Criminal Facilitation in the Second Degree. On June 10, 1972 the jury acquitted on the latter four and hung on the first count of Grand Larceny in the Second Degree. The plea of guilty covered that count and Indictment No. 998/70 which charged him with Grand Larceny in the

(footnote continued on following page)

stated that based on the facts and representations made by the District Attorney's office and counsel for the defendant and known to him, it was his opinion that no incarceration was required.

Subsequent to the plea and prior to sentence, the judge discovered that he "was not aware, nor . . . advised as to the extent of (the defendant's) participation involving the fraudulent scheme which was the basis of the Grand Larceny in the Second Degree", and that the defendant's participation was "not peripheral, subordinate or minor, but rather major as a principal participant in the fraud". As a result he "(could) not in good conscience and in the interests of justice keep the promise . . . to no incarceration". The judge so advised the defendant on August 9, and gave him until August 16 to decide whether he wanted to withdraw his plea or proceed with sentence, the sentence being imprisonment. On August 16, the defendant refused the offer to withdraw his guilty plea. He was then sentenced to an indeterminate term of up to five years.

(footnote continued from preceding page)

Second Degree [two counts], Conspiracy in the Third Degree [two counts] and Criminal Facilitation in the Second Degree [two counts]).

Thomas Dunn: January 21, 1971 plead guilty to Criminal Possession of a Forged Instrument in the Third Degree (he had been charged with the crimes of Grand Larceny in the Second Degree, Conspiracy in the Third Degree, Forgery in the Second Degree and Criminal Possession of a Forged Instrument in the Second Degree).

Arnold Mann: December 21, 1972 indictment dismissed in the interest of justice (he had been charged with Criminal Facilitation in the Second Degree [two counts] and one count had been dismissed on August 6, 1971).

POINT I

It is a matter of discretion lying solely in the State courts to determine the remedy when a sentence promise is to be undone.

This Court in *Santobello* v. *New York*, 404 US 257, 30 LEd 2d 427, 92 SCt 495 (1971), clearly enunciated two principal propositions relating to "plea bargaining":

1) "There is . . . no absolute right to have a guilty plea accepted."

2) Once a guilty plea is accepted, there must be "specific performance of the agreement" *or* the defendant must be given the "opportunity to withdraw his plea of guilty," in the discretion of the state court.

There was no preference stated for either alternative and the choice was left solely to the state courts in the exercise of their discretion.

> "The ultimate relief to which petitioner is entitled we leave to the discretion of the state court, which is in a better position to decide whether the circumstances of this case require only that there be specific performance of the agreement on the plea, in which case petitioner should be re-sentenced by a different judge, or whether, in the view of the state court, the circumstances require granting the relief sought by petitioner, i.e., the opportunity to withdraw his plea of guilty."

The Court of Appeals has now held that the discretion as a matter of state law is to be exercised by the sentencing court.[3] (*People* v. *Setikoff*, 35 NY 2d 227, 360 NYS2d 623

[3] The State Legislature also recognized the fact that the exercise of discretion lies with the Court and not with the defendant when it enacted Section 220.60(4), CPL providing that at any time prior to the imposition of sentence, the Court may in its discretion, permit the defendant to withdraw his plea and restore him to his prior position.

[1974]). As there is no unique fact in the instant case which would mandate action without the exercise of discretion, there is no issue presented for review in this Court.

POINT II

There was no violation of the defendant's rights.

A defendant has a right to a jury trial to determine his guilt or innocence and the State has a right to a trial to determine a defendant's guilt or a plea of guilty as charged (220.60[1], CPL). The defendant may waive his right and enter a plea of guilty or ask the district attorney and the court to allow him to plead guilty to less than the entire indictment or to a lesser included offense in satisfaction of the charges pending against him (220.10[4][5], CPL). With the permission of the court and the consent of the district attorney, a compromise plea may be entered (220.60[3], CPL).

A defendant has a right to a jury trial to determine his guilt or innocence and the State has a right to a trial to determine a defendant's guilt or a plea of guilty as charged (220.60[1], CPL). The defendant may waive his right and enter a plea of guilty or ask the district attorney and the court to allow him to plead guilty to less than the entire indictment or to a lesser included offense in satisfaction of the charges pending against him (220.10[4][5], CPL). With the permission of the court and the consent of the district attorney, a compromise plea may be entered (220.60[3], CPL).

When the plea is entered based upon a representation as to what the sentence will be, and the judge later finds that that sentence would be inappropriate, the defendant must be given the opportunity to withdraw his plea or the sentence indicated must be imposed, in the discretion of the trial judge. As in the instant case, the compromise

plea usually severely limits the possible sentence as compared to that permissible under the original charges. Thus, if the trial judge decides that specific performance of the sentence representation would be inappropriate and gives the defendant the opportunity to withdraw his plea, the defendant has the option of letting the plea stand, thus limiting the sentence, or withdrawing his plea and standing trial on the original charges.

While a defendant is protected from being twice put in jeopardy for the same offense, jeopardy does not attach if a plea of guilty is "nullified by a court order which restores the action to its pre-pleading status" (40.30[3], CPL). Thus, when a plea of guilty is vacated, the other charges that were taken into consideration are revived and the defendant may properly be tried on the entire indictment (*People* v. *Rice*, 25 NY 2d 822, 303 NYS2d 677 [1969]).

> "If the state court decides to allow withdrawal of the plea, the petitioner will, of course, plead anew to the original charge on two felony counts."
>
> *Santobello* v. *New York, supra,* footnote 2.

When the sentencing court exercises its discretion it must always consider whether if the plea is withdrawn, the parties can be returned to the status obtaining before the plea.

> "If the promised sentence was the inducement for the guilty plea, defendant is entitled to have the promise fulfilled or, if the arrangement is to be undone, the People and defendant are entitled to be restored to the status obtaining before the plea."
>
> *People* v. *Di Giacomo,* 40 AD 2d 689, 336 NYS2d 260 (1972).

Thus, when for some reason the case cannot be tried, or "(circumstances) arise which, in justice, would require

granting a defendant the consideration he was advised he would receive at the time of his guilty plea", the state court will order imposition of the indicated sentence (*People* v. *Esposito*, 32 NY2d 921, 347 NYS2d 70 [1973]; *People* v. *Selikoff*, *supra*).

In the instant case, by withdrawal of the plea, it was possible to place the parties in the *status quo ante*.[4]

> "The record does not disclose any change of position by defendant other than what occurs on any plea of guilty."

The trial judge thus, as was his prerogative in the exercise of discretion, gave the defendant an opportunity to withdraw his plea and when he refused to do so, imposed a sentence of imprisonment.

A sentence commitment in the case of a felony is as a matter of law contingent until after receipt of the probation report.

There cannot, as contended by the defendant, be any absolute sentence promise by the Court at the time of the acceptance of a guilty plea as such would be violative of the statutory scheme. Prior to imposing sentence on a felony conviction, the court must order a pre-sentence investigation "with respect to the circumstances attending the commission of the offense, the defendant's history of delinquency or criminality, and the defendant's social history, employment history, family situation, economic status, education and personal habit" and may not pronounce sentence prior to receiving a written report of such investigation (390.20[1]; 390.30[1], CPL). While such report may be made prior to conviction (380.30, CPL), the

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[4] While the defendant alleges (pp. 10, 28) that "he disclosed a good deal of information to the prosecutorial authorities," no information was given to the district attorney and on oral argument in the Court of Appeals counsel stated that the "information" referred to was the plea of guilty itself.

volume of work assigned to understaffed probation departments makes such impossible, especially in the case of a defendant released on bail, as extensive time may be consumed in investigation where such is not necessary (i.e.; acquittal; dismissal; misdemeanor conviction (390.20[2], to the detriment of others already convicted (see: *People ex rel. Weingard* v. *Casscles*, 40 AD 2d 530, 333 NYS2d 973 [1972]; *People* v. *Gibson*, 39 AD 2d 947, 333 NYS2d 104 [1972]). It is thus obvious that the Legislature intended that (a) a lesser plea may be accepted by the court (220.60[3], CPL); (b) a tentative sentence commitment may be made (no prohibition); (c) a complete pre-sentence investigation must be made prior to sentence (390.20[1]; 390.30[1], CPL); (d) if the voluntariness of a plea is not clear to the court, the court in its discretion may permit it to be withdrawn (220.60[4], CPL); (e) if the plea is not withdrawn, the court must impose sentence (380.20, CPL); (f) the sentence must be imposed with regard to its deterrent influence, the rehabilitation of the defendant and the protection of the public (1.05[5], PL).

Thus, after having received the probation report in which the defendant asserted his innocence and having presided over a trial involving co-defendants and co-conspirators during which the extent of the defendant's participation was for the first time fully revealed, the judge determined that he could not "in good conscience and in the interests of justice keep the promise (of) no incarceration". The judge then offered to put the defendant in the *status quo ante*. The defendant, of course, did not wish to subject himself to the term of imprisonment which the plea of not guilty permitted and thus attempted to force the judge to impose a sentence of non-imprisonment.

While the defendant contends that the facts elicited on trial were believed by the district attorney to be of no moment, such is not the fact. The district attorney believed and still believes, that the plea entered was just under the

circumstances. The fact remains that sentence is within the sole province of the court and the court must have all the facts *it* deems necessary.

POINT III

The judgment entered.

It is not contended that an admitted felon such as the defendant cannot rely on representations by a court. It is clear, however, that a convicted felon cannot have his hopes and desires override the sound exercise of discretion by the court. A defendant has no "contract" for a particular type of sentence and an arrangement as in the instant case represents as a matter of law a contingent arrangement until such time as it is confirmed by the judge subsequent to his review of the pre-sentence report by the actual imposititon of sentence. To hold otherwise would be to prevent judges from ever indicating a sentence predisposition, which would have the result of unnecessarily prohibiting pleas in those great majority of cases where the predisposition conforms to the final conclusion. Given the present realities, it would result in intolerable calendar congestion. Lest it be argued however, that no such condition was expressly affirmed at the time of original plea, it should be pointed out that this was wholly unnecessary as such a conditional nature of the sentence commitment is of necessity implied.

Further, there is no indication that the defendant has been prejudiced or has changed his position in reliance upon the plea (as might have been the case had he testified as a State's witness subsequently). Even if there had been such reliance, courts of justice are capable of protecting the defendant's interest in a less drastic manner than granting that type of inappropriate specific performance which would render the solemn exercise of judicial discretion in sentencing a robot-like compliance with the demands

of the convict. On appeal, the court could take judicial notice of the great and broad experience of defendant's counsel at the time of plea, to insure itself that there was not unreasonable reliance upon the absolute nature of the plea.

The judge at the time of accepting the guilty plea having advised the defendant that based upon the facts known to him, no imprisonment would be necessary; felt that that statement might have induced the defendant to enter the guilty plea. He therefore, in the exercise of his discretion, gave the defendant an opportunity to return to his prior position where he would have the only rights he ever had, namely to proceed to trial, to enter a plea of guilty as charged or to ask the court and the prosecutor to permit him to plead to a lesser charge.

The defendant having elected to decline the offer to withdraw his guilty plea was properly sentenced to an indeterminate term of up to five years. He may not now change his mind.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Transcript of Proceedings Before Burchell, J. Dated May 12, 1972 (Plea).

COUNTY COURT—PART III

COUNTY OF WESTCHESTER—STATE OF NEW YORK

Indictment Number 997/70

PEOPLE OF THE STATE OF NEW YORK

—against—

SHELDON SELIKOFF

Defendant

May 12, 1972
County Court House
White Plains, New York

BEFORE:

HON. GEORGE D. BURCHELL

County Court Judge

APPEARANCES:

CARL A. VERGARI, District Attorney
JOSEPH K. WEST, SR., Ass't D.A.
ALFRED CHRISTIANSEN, A.D.A.
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White Plains, New York

VINCENT W. LANNA, ESQ.
50 Riverdale Avenue
Yonkers, New York
For: SHELDON SELIKOFF—*Deft.*

ROSE A. IMPALLOMENI
Official Court Reporter

Transcript of Proceedings Before Burchell, J.
Dated May 12, 1972 (Plea).

Mr. West: You are Sheldon Selikoff?

Sheldon Selikoff: That is correct.

Mr. West: And you are represented in Court this morning with your attorney Mr. Lanna?

Sheldon Selikoff: Yes, sir.

Mr. West: Judge, if it please the Court I believe this defendant has an application to make. Mr. Lanna.

Mr. Lanna: If Your Honor please, this defendant is now desirous under indictment 997/70 of withdrawing his previously entered plea of not guilty under the first count of that indictment and to enter in its place instead a plea of guilty to the first count as charged in full satisfaction of that entire indictment. In addition under indictment number 606/70, this defendant is also desirous of withdrawing his previously entered plea of not guilty under the second count of that indictment and entering in its place instead, a plea of guilty to that second count in full satisfaction of indictment 606/70. Now both of the pleas of which I have just referred to are not only in satisfaction of these two indictments namely 606/70 and 997/70, but in addition are in full satisfaction of indictment numbers 998/70 and 999/70.

Mr. West: May I proceed Your Honor.

The Court: Yes.

Mr. West: Mr. Selikoff, is this plea voluntarily made by you this morning?

Sheldon Selikoff: Yes.

Mr. West: Both of these pleas, is that correct?

Sheldon Selikoff: Yes sir.

Mr. West: Have you had time to consult with Mr. Lanna prior to making these pleas?

Sheldon Selikoff: Yes sir.

Mr. West: Do you understand sir that by your plea of guilty to Grand Larceny in the second degree under indictment number 997/70 you are pleading guilty to a class "D" felony.

Transcript of Proceedings Before Burchell, J.
Dated May 12, 1972 (Plea).

Sheldon Selikoff: Yes sir.

Mr. West: And do you understand that that plea that you are entering this plea today just the same as if you had a trial and had been found guilty of this class "D" felony?

Sheldon: Selikoff: Yes sir.

Mr. West: Do you sir freely and voluntarily admit, that in this county on or about January 24, 1968, you stole from one J. Radley Metzker property to wit current monies of the United States of America of the aggregated value of over $1,500.

Sheldon Selikoff: Yes sir.

Mr. West: And now have you been threatened or coereed to induce this plea?

Sheldon Selikoff: No sir.

Mr. West: Do you sir withdraw all motions heretofore made with respect to all indictments now pending against you?

Sheldon Selikoff: Yes sir.

Mr. West: Have been any promises made to you sir by the Westchester County District Attorney's Office.

The Court: At this point Mr. West I would like to place on the record, Sheldon Selikoff, I have had a number of conferences with your attorney and with representatives of the District Attorney's Office with regard to the cases against you. Based upon the results of the conferences and conversations and the fact and representation made to the court, I indicated to the attorney and I am now indicating to you that in my opinion in the interest of justice that no incarceration of you is required and based upon this plea as to what other sentence I shall impose, I do not know and I make no promises. Do you understand that?

Sheldon Selikoff: Yes sir.

Mr. West: Now sir, have there been any other promises made to you by the Westchester County District Attorney's office?

Transcript of Proceedings Before Burchell, J.
Dated May 12, 1972 (Plea).

Sheldon Selikoff: No sir.

Mr. West: Have there been any promises made to you by Mr. Lanna?

Sheldon Selikoff: No sir.

Mr. West: Have you been promised anything by the Probation Department of this County?

Sheldon Selikoff: No sir.

Mr. West: And now with respect to your plea of guilty under indictment number 606/70 to the crime of obsenity in the second degree, is that plea voluntarily made by you?

Sheldon Selikoff: Yes sir.

Mr. West: Have you been threatened or coerced to induce that plea?

Sheldon Selikoff: No sir.

Mr. West: Have you had time to consult with Mr. Lanna with respect to this plea?

Sheldon Selikoff: Yes sir.

Mr. West: And do you sir freely and voluntarily admit that in the Town of Greenburgh, this County and State, on or about August 9, 1970, knowing its contents and character, you did promote and possess with the intent to promote obscene material by exhibiting a motion picture film depicting the act of sexual intercourse to one Rita Feinburg.

Sheldon Selikoff: Yes sir.

Mr. West: Do you understand sir that by rendering this plea, it is just the same as if you had a trial and had been found guilty of this class "A" misdemeanor?

Sheldon Selikoff: Yes sir.

Mr. West: Have there been any promises made to you with respect to this plea?

Sheldon Selikoff: No sir.

The Court: What I said Sheldon Selikoff in regard to the plea on the other indictment goes with this plea also. Do you understand that?

Sheldon Selikoff: Yes sir.

Transcript of Proceedings Before Burchell, J.
Dated May 12, 1972 (Plea).

The Court: I will not answer as to what other punishment I shall impose, I will reserve to that.

Mr. West: Have there been any other promises made to you sir by anyone?

Sheldon Selikoff: No sir.

Mr. West: Judge based upon all the facts and circumstances of this case and based further on the fact that this defendant has no prior felony conviction to our knowledge, we would move for the consolidation of indictment 998 and 999 with 997, for the purpose of the plea that was entered under 997/70. We would ask the court to advise his defendant of his rights and to accept this plea.

The Court: Well Sheldon Selikoff before the court can accept your offered plea you must be advised that if you have been previously convicted of any crime or even an offense that that fact may be and if that fact is established in connection with your plea of guilty on the indictment which you are being arraigned here, that this may result in additional or different punishment than that as prescribed by law. Do you understand that sir?

Sheldon Selikoff: Yes.

The Court: With that understanding do you still wish to offer this plea of guilty?

Sheldon Selikoff: Yes sir.

The Court: The pleas have been accepted. Sentence will be set down. Mr. Lanna do you have any problem with your military service?

Mr. Lanna: Your Honor may I suggest the 19th of June?

The Court: Sentence will be the 19th of June.

Mr. West: May the record reflect that the plea is accepted during trial your Honor?

The Court: Yes sir.

Transcript of Proceedings Before Burchell, J. on August 16, 1972 (Sentencing).

COUNTY COURT—WESTCHESTER COUNTY

Indictment Nos. 606-70 997-70

Sentence

THE PEOPLE OF THE STATE OF NEW YORK

against

SHELDON SELIKOFF,

Defendant.

August 16, 1972
Part 3
White Plains, New York

Before:

HON. GEORGE D. BURCHELL, Judge.

APPEARANCES:

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By: JOSEPH K. WEST, Esq.
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PATRICK McKAY
Court Reporter

Transcript of Proceedings Before Burchell, J. on August 16, 1972 (Sentencing).

Mr. West: May I proceed, Your Honor?

The Court: Yes.

Mr. West: You are Sheldon Selikoff; is that correct?

The Defendant: Yes, sir.

Mr. West: You are represented in Court this morning by your attorney, Mr. Lanna?

The Defendant: Yes, sir.

Mr. West: Judge, if it please the Court, this defendant having heretofore plead guilty under Indictment No. 606 of 1970 to obscenity in the second degree and having also plead guilty under Indictment No. 997 of 1970 to grand larceny in the second degree, the People will move for sentence.

Court Clerk: Sheldon Selikoff, do you have any legal cause to show why judgment should not now be pronounced against you?

The Defendant: No.

Court Clerk: Mr. West, do you have any recommendation to make?

Mr. West: No, Your Honor, the People have no recommendation.

Court Clerk: Mr. Lanna, would you like to address the Court?

The Court: If I may make a statement, Mr. Lanna, at this point, if I may?

Mr. Lanna: Yes, sir.

The Court: Sheldon Selikoff, on May 12th, 1972, upon the recommendation of the District Attorney, you were permitted to plead guilty to one count of grand larceny in the second degree, the first count of Indictment No. 997 of 1970, which contained six counts of grand larceny in the second degree and one count of conspiracy in the third degree. This plea to the first count of that indictment was in full satisfaction of that indictment as well as Indictment Nos.

998 of 1970 and Indictment No. 999 of 1970. Indictment No. 998 of 1970 contained two counts of grand larceny in the second degree, two counts of conspiracy in the third degree against you. Indictment No. 999 of 1970 contained twenty-five counts against you, seventeen of which were for grand larceny in the first degree, and eight of which were for grand larceny in the second degree. You were also, on the recommendation of the District Attorney, allowed to plead guilty to the second count of Indictment No. 606 of 1970; namely, to the crime of obscenity in the second degree. That was to cover three other counts of obscenity in the second degree, one count of obscenity in the first degree, and one count of sexual abuse in the third degree, and one count of criminal solicitation in the second degree, and one count of consentual sodomy. At the time that such pleas were entered, this Court was not aware, nor was it advised, as to the extent of your participation involving the fraudulent scheme which was the basis of the grand larceny in the second degree of Indictment No. 997 of 1970 to which you plead guilty.

This Court, therefore, based upon the information it then had, informed you at the time you pleaded guilty that it did not believe that a sentence calling for your incarceration was required in the interest of justice.

Subsequent to this expression of this view, however, this Court presided at the trial of the several co-defendants named in the same indictment with you, which trial lasted for some six weeks. From the evidence adduced on behalf of the People's case on this trial, it appeared to this Court that your participation in the fraudulent scheme which was the basis of the larceny alleged in this count of the indictment, as well as in the other larcenies alleged in the other indictments, Indictment 998 of 1970 and 999 of 1970, involving thousands of dollars, was not peripheral,

subordinate or minor, but rather major and as a principal participant in the fraud.

In light of these facts and circumstances, the Court feels that at this time that it cannot in good conscience and in the interests of justice keep the promise here to no incarceration.

Furthermore, it appears from your pre-sentence report filed by the Probation Department that you deny any participation in any fraud by which sums of money were extracted from money lenders.

Again, in regard to the indictment charging you with sexual impropriety, you, according to the pre-sentence report, deny any guilt in any such acts and claim that you are a victim of some persecution.

Now, in view of these circumstances and in the interests of fairness and in the belief that the ends of justice will be served, this Court believes it should allow you to withdraw your pleas of guilty to both of the indictments and have your original plea of not guilty thereto reinstated, and that you be given your day in Court to contest the charges of the People.

Accordingly, Mr. Selikoff, this Court hereby grants you the opportunity to withdraw your pleas as heretofore made as to the two indictments.

Now, what is the decision?

Mr. Lanna: If Your Honor please, with all due respect to the Court, Mr. Selikoff is not desirous of withdrawing his pleas of guilty as heretofore entered on May 12th, 1972 during the course of the trial under Indictment No. 997 of the year 1970. Those pleas being entered to both that indictment and Indictment No. 606 for the year 1970 in full satisfaction of those indictments and also Indictments No. 998 and 999 for the year 1970.

May I state for Your Honor although I am not aware

of what is in the pre-sentence report except to what Your Honor has already indicated, that we predicate our refusal, first, on the ground that we do not wish to withdraw those pleas. Secondly, I believe that legally, and despite what Your Honor may extract from that pre-sentence report, we have an absolute right not to withdraw them and to permit them to stand. I think the authority along those lines is the case of North Carolina against Alford, 400 US 25, which was also followed in People against Fooks, 21 NY 2d 338, and People v. Creazzo, 39 App. Div. 2d 748, and, of course, Alford, Your Honor undoubtedly knows, dealt with a situation where it was the defendant who was desirous of withdrawing a plea of guilty and the Court in North Carolina wouldn't permit it, and they went up to the U.S. Supreme Court. The Supreme Court, in substance, said that there may be many reasons why a person who professes his innocence may yet wish to enter a plea of guilty to particular charges, perhaps so similar to the person who is gun shy and does not wish to go into combat, similar to the person who does not wish to expose himself to the possibility of a conviction with an onerous sentence which might be imposed. Therefore, even though he professes his innocence, he would rather play it safe, so to speak.

However, there is yet another ground wherein this case Mr. Selikoff has a right to continue his plea. As Your Honor undoubtedly recalls, we had rather extensive discussions in chambers during the course of the trial under indictment No. 997 for the year 1970, at which time I believe several representatives of the District Attorney's Office were there: Mr. West, who was the Chief Trial Counsel, Mr. Christiansen, who was assisting him and at one stage or another we had Mr. Moley, who I believe is in charge of that Trial Division, if that is his proper title,

and, of course, Mr. Thomas Facelle, who is Chief Assistant District Attorney of this County. We discussed with you the circumstances surrounding this indictment as well as indictment 998 and 999 for the year 1970, and it's my recollection that in addition to myself, the attorney of record for Mr. Selikoff, I being trial counsel, as Your Honor might recall, Mr. Scancarelli and I both informed Your Honor that although we felt Mr. Selikoff was not under Indictment 997 of the year 1970 truly criminally implicated in it, we were most concerned regarding Indictments 998 and 999 for the year 1970, and in addition to that fact we pointed out to you Mr. Selikoff's background, that he had a prior problem in the Federal Courts out of Newark, New Jersey district, and it's my recollection that the District Attorney and his representative or representatives, depending upon which time we are speaking of, were all there and they certainly were aware of what their case file had as regards whatever Marx's testimony was going to be and they were willing to accept these pleas and did state at the time that they would have no recommendation as to sentence.

The Court: If I may interrupt you, Mr. Lanna? Were you present during the trial of the co-defendants?

Mr. Lanna: I sat through it from time to time.

The Court: In none of these discussions prior to the entering of the pleas was there any discussion about the defendant, specifically, this defendant's role, if any, in the alleged crimes before me.

Mr. Lanna: That is true. In fact—

The Court: The District Attorney may have known about it but I was not advised.

Mr. Lanna: I have to say to you, I recall we did discuss with you the fact that we were not as concerned with his role under Indictment 997 as we were under 998 and

999 of 1970, which, of course, regardless of the outcome of 997, might very well have led into those subsequent indictments and to the trial of those subsequent indictments. Now, I think Your Honor must keep in mind that when a defendant negotiates a plea he, of course, does it with the salient thought in mind and that is to negotiate the best possible plea he can get. So that he can get out from under. This defendant had four indictments and having been found guilty under any which one of these, just speculating to that, it could expose him to very serious penalties, and assuming arguendo, even though he was successful in defending three of them.

Again I say that this was brought to the attention of the Court, if not expressly, I think implicit. I think this was all part of the plea bargaining, in addition to the fact that this defendant also had undergone considerable expense in this matter which I first believe was started in February of 1970 in this Court before Judge Sullivan, at which time I think it ran through seven or eight or ten days listening to tapes and it was aborted because of newspaper publicity. We again started and took up perhaps another week or ten days of not only tapes but the selection of the jury.

The Court: I had nothing to do with any prior motions or applications made in this case.

Mr. Lanna: I agree.

The Court: I was assigned this trial, and that was my function.

Mr. Lanna: What I am trying to convey to the Court is that these are calculated decisions by all persons concerned. These are expensive decisions, and at this time the defendant feels that under that posture he has an absolute right to stand with his plea.

Now, if I may just quote for Your Honor those decisions and the law which I think is applicable, and with all

due respect, I feel that Your Honor's promise would be binding, that is, the promise that was made in May of 1972. The case I would like to quote is Santobello—

Mr. West: February of '72.

Mr. Lana: Mr. West has just corrected me, '72. In Santobello against New York, I don't have the official citation but it's 30 Law Edition 2nd 427—

The Court: I have read that case.

Mr. Lanna: I am sure, your Honor, you have. But I feel that the principles that apply in the Santobello case dealing with the prosecution rather than a Judge would be equally applicable to the Court in that there we had a promise even though inadvertent it was not kept, and in that case, if I may just quote from Page 433, "This phase of the process of criminal justice and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled."

Now, in that case it was sent back, it was reversed and sent back, and the Supreme Court suggested one of two remedies: either specific performance or permitting a withdrawal of the plea of guilty.

Now, just recently reported with that the Appellate Division, First Department, ruled also that was the Santobello case, and that is found in 39 App. Div. 2d 654, the Appellate Division said, although the dissenting opinion, the Judge most vehemently said he would have been happy to permit the withdrawal of the plea because evidently Santobello had a very horrible background and would have been in a much worse position if the plea was withdrawn and he

permitted to go to trial on a more serious felony, despite that, the majority stated that we are bound by the law of this State under the authority of People against Keehner, 28 App. Div. 2d 559, which was affirmed by 25 NY 2d 884, also People against Chadwick, reported in 33 App. Div. 2d 687, to specific performance once a promise has been made in good faith and even though we might be sorry for it later, as long as there wasn't any false representations and any fraud perpetrated upon anyone, that even later on we might feel perhaps on negotiations or our decision or promise wasn't a good one, we are bound by it.

For those reasons, I feel that this defendant is entitled to specific performance of the promise which was made in May of 1972.

Mr. West: Judge, I would like to be heard briefly. Mr. Lanna, first of all, announces to me that this defendant now wishes to enter into the Alford type of plea whereby I am not guilty but I will plead guilty for various other reasons. During the actual plea taking, I, myself, personally asked this defendant did he freely and voluntarily admit certain things and he stated, yes. In other words, he had admitted his guilt with respect to these two crimes. My office, as Mr. Lanna has pointed out, there were numerous people there and it was our distinct understanding that this defendant would admit his guilt with respect to those two counts, with respect to those two indictments and that was the type of plea we were consenting to.

We are now told that your presentence report does indicate that this defendant now denies any guilt and I cannot say what effect that would have had on my office in consenting to this plea. There have been similar cases where my office has refused to consent to a reduced type plea where the defendant says, "I did not do it but I will plead guilty." So that might have had some effect as to my office saying we would consent to those two pleas.

Transcript of Proceedings Before Burchell, J. on August 16, 1972 (Sentencing).

Further, there was some mention made as to whether or not my office had made known the involvement of this defendant in these crimes and I would merely state that we played for the Court a taped conversation as between this defendant and one Jay Marx, and it was our clear understanding from that recording that this defendant was conspiring then with Jay Marx to perpetrate a fraud and to refresh Your Honor's recollection of it, I would only point out the part where this defendant was alleged to have said on that tape recording, "Maybe you should strap your leg up so you will always walk with the same type limp."

Also, we feel from the actual playing of that tape we had made known to some extent anyway with respect to one incident of this defendant's involvement in the scheme.

The Court: It indicated his involvement, Mr. West, but to the extent—

Mr. West: We feel that there was made here was an actual quid pro quo pact here. This defendant pleaded guilty under Your Honor's statement that he did not feel that he should be incarcerated as a result of these pleas at that time. It would seem to us if Your Honor now having learned more of this defendant's involvement feels that he has to be incarcerated, the fair thing and the just thing would be to return this defendant to the status he was in prior to his plea and to say I cannot live up to what I said, having found out that and the interests of justice dictate something else, I will, therefore, let you, Mr. Selikoff, withdraw your plea. I don't know of anything else that Your Honor could do in the interests of justice.

It's my understanding that Your Honor has offered this defendant his opportunity to withdraw this plea and though I was not here I would like this record to show that this offer was extended to the defendant, I believe some time

last week in Court when Your Honor first made it known to this defendant that he would be given the opportunity to withdraw his plea. I would like this record to reflect that he has had that week to actually think about it.

The Court: I expressed myself in Court and I suggested to Mr. Lanna that he consult with his client and give the matter some discussion, having in mind I indicated what my direction was going to be, and that is why we are here today on the adjourned date.

Mr. Lanna: May I just be heard one moment, Your Honor, please?

The Court: I have a jury waiting.

Mr. Lanna: I know, but this is a very delicate issue. As far as Mr. West pointed out that the defendant did admit when he was questioned as to whether or not he had wilfully participated in these crimes, I think that the law has long been since settled. Specifically, when you are dealing with satisfaction of other indictments, that these statements which quite often are made before the Court are made for other purposes such as, the Alford decision, because one wishes to enter a plea for the disposition of a serious number of charges such as certainly was the situation here. If I may add, and I thank Mr. West for pointing out that these tapes were played and certainly those tapes as far as I am concerned were rather damaging to this defendant, despite what he might think, not only that, but Your Honor stated you were relying to some extent more upon Mr. Marx's testimony at the trial.

Well, of course, let me say this: Mr. Marx testified against the remaining co-defendants and he sort of had a field day as to what he was going to say against the defendant Selikoff. You know, it's human nature, especially when you are dealing with confidence people, I think we have to determine that Mr. Marx would like to give the

jury the impression that he wasn't really entirely the sole bad guy. I want you to understand the guy who isn't here who I am punching at with the use of mirrors in this room is equally as guilty as I, so don't look at me as I sit on the stand as being the only bad guy. I am only half bad.

Remember, he wasn't subject to cross examination on behalf of Selikoff. He had sort of a free rein and a field day. I can understand Your Honor's listening to it and perhaps being appalled by it but I also think the Court should have taken that factor into consideration.

With that, again, of course, as Mr. West has pointed out, we've had a week to think about this and we have thought about it a great deal. We feel that we are entitled to specific performance.

The Court: Well, I have reviewed the authorities in this matter and have given the matter serious and deep thought, and I can see my way in only one direction, Mr. Lanna, and I will proceed that way.

As I said, as I understand the procedure, I have to give you this opportunity, Mr. Selikoff, to withdraw your plea or to affirm your plea, and I gather through your attorney that you have decided to affirm your pleas of guilty; is that correct?

The Defendant: Yes, sir.

The Court: In that event, the Court, it appears, has no alternative but to impose the sentence as to each count since, by your plea of guilty, you admit your guilt and based upon the facts and circumstances as ascertained by the Court from its participation in the aforesaid trial and from the information obtained from your pre-sentence report, I am required in the exercise of my responsibility to proceed with your sentence. Before the Court proceeds with your sentence, Mr. Selikoff, do you wish to say anything more to the Court at this time?

Transcript of Proceedings Before Burchell, J. on August 16, 1972 (Sentencing).

The Defendant: No, sir.

The Court: All right. Under all of the facts and circumstances in regard to Indictment No. 606 of 1970, under the plea of guilty to the crime of obscenity in the second degree, a Class A misdemeanor, it is the sentence of this Court that you pay into the Court a fine of the sum of $1,000 on or before September 1, 1972.

In regard to Indictment 997 of 1970, that plea of guilty to the crime of grand larceny in the second degree, a Class D felony, for which you could receive up to seven years in State's Prison, it is the sentence of this Court that you be sentenced to State Prison for an indeterminate term, the maximum of which shall be five years.

Now, Mr. Lanna, have you any further applications to make?

Mr. Lanna: Yes, if Your Honor please—

Mr. West: Prior to that, may I interrupt Your Honor and ask that you advise this defendant of his right to appeal?

The Court: Yes. I advise you of your right to appeal from this sentence of the Court and you have thirty days to do so by filing a Notice of Appeal with our Appellate Division Court. If you wish to appeal and do not have the funds to hire a lawyer to file a required Notice of Appeal, you may apply and ask the Appellate Division if it will appoint an attorney to file the Notice of Appeal for you.

Do you understand your right of appeal?

The Defendant: Yes, sir.

The Court: All right, Mr. West?

Mr. West: Nothing else, Your Honor.

The Court: Mr. Lanna?

Mr. Lanna: If Your Honor please, I would most respectfully request that specifically in view of what has occurred this morning, I think Your Honor will readily

agree that certainly this is an appealable issue here and that this defendant be given a stay of execution so that he may have an opportunity to file a notice and a motion in seeking bail pending the appeal. If I may, I am going to ask Your Honor for two or three weeks, as I am leaving tomorrow night for Fort Bragg and I shall not return until September 2nd. I would ask if you would give this through September the 10th, Your Honor, please? Give me some time in which, not much time, actually, because I won't be here—

The Court: The 10th is a Sunday.

Mr. Lanna: I am sorry. My addition is wrong. That would be the 7th?

The Court: That's a Thursday.

Mr. Lanna: The 8th.

The Court: Yes.

Mr. West: Your Honor, do I understand the purpose of the stay was to allow counsel some time to bring on a motion for bail, what we used to call a Certificate of Reasonable Doubt?

Mr. Lanna: Yes. It's not called a Certificate of Reasonable Doubt anymore. It's an application for bail.

Mr. West: Judge, I leave it up to your discretion.

The Court: I think under the facts and circumstances, I will grant your application, Mr. Lanna.

Mr. Lanna: Thank you very much, Your Honor.

The Court: The stay of execution of sentence is hereby granted.

(Whereupon, the proceedings were concluded.)

Statutes*

New York Criminal Procedure Law

§ 40.30 Previous prosecution; what constitutes

3. Despite the occurrence of proceedings specified in subdivision one, if such proceedings are subsequently nullified by a court order which restores the action to its pre-pleading status or which directs a new trial of the same accusatory instrument, the nullified proceedings do not bar further prosecution of such offense under the same accusatory instrument.

§ 220.10 Plea; kinds of plea

4. Where the indictment charges but one crime, the defendant may, with both the permission of the court and the consent of the people, enter a plea of guilty of a lesser included offense.

5. Where the indictment charges two or more offenses in separate counts, the defendant may, with both the permission of the court and the consent of the people, enter a plea of:

(a) Guilty of one or more but not all of the offenses charged; or

(b) Guilty of a lesser included offense with respect to any or all of the offenses charged; or

(c) Guilty of any combination of offenses charged and lesser offenses included within other offenses charged.

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* The statutes are reproduced as they were in effect at the times in question.

§ 220.60 Plea; change of plea

1. Except as provided in subdivision two, a defendant who has entered a plea of not guilty to an indictment as a matter of right withdraw such plea at any time before rendition of a verdict and enter a plea of guilty to the entire indictment.

2. A defendant who has entered a plea of not guilty to an indictment charging the crime of murder as defined in subdivision one or three of section 125.25 of the penal law may, before the rendition of a verdict, withdraw such plea and enter a plea of guilty to the indictment only under circumstances prescribed in subdivision three of section 220-10.

3. A defendant who has entered a plea of not guilty to an indictment may, with both the permission of the court and the consent of the people, withdraw such plea at any time before the rendition of a verdict and enter a plea of guilty to part of the indictment pursuant to subdivision four or five of section 220.10.

4. At any time before the imposition of sentence, the court in its discretion may permit a defendant who has entered a plea of guilty to the entire indictment or to part of the indictment to withdraw such plea, and in such event the entire indictment, as it existed at the time of the plea of guilty, is restored.

§ 380.20 Sentence required

The court must pronounce sentence in every case where a conviction is entered. If an accusatory instrument con-

tains multiple counts and a conviction is entered on more than one count the court must pronounce sentence on each count.

§ 390.20 Requirement of pre-sentence report

1. Requirement for felonies. In any case where a person is convicted of a felony, the court must order a pre-sentence investigation of the defendant and it may not pronounce sentence until it has received a written report of such investigation.

§ 390.30 Scope of pre-sentence investigation and report

1. The investigation. The pre-sentence investigation consists of the gathering of information with respect to the circumstances attending the commission of the offense, the defendant's history of delinquency or criminality, and the defendant's social history, employment history, family situation, economic status, education, and personal habits. Such investigation may also include any other matter which the agency conducting the investigation deems relevant to the question of sentence, and must include any matter the court directs to be included.

New York Penal Law

§ 1.05 General Purposes

5. To insure the public safety by preventing the commission of offenses through the deterrent influence of the sentences authorized, the rehabilitation of those convicted, and their confinement when required in the interests of public protection.